## LIM WOON CHONG & ANOR. v. PUBLIC PROSECUTOR

**[F.C. (Suffian L.P., Syed Othman & Ibrahim Manan F.JJ.) May 18, 22, June 6, and 25, 1979]**

**[Kuala Lumpur — Federal Court Criminal Appeal No. 10 of 1978]**

*Criminal Law and Procedure — Appeal against conviction — Trial under Emergency regulations — Whether Proclamation of Emergency valid and in force — Whether laid before Senate — Essential (Security Cases) Regulations, 1975 — Emergency (Essential Powers) Act, 1979.*

*Constitutional Law — Proclamation of Emergency — Whether laid before Senate — Distinction between "presentation to" and "laying before" — Emergency (Essential Powers) Act, 1979 — Federal Constitution, arts. 63(1) & 150(3)).*

This was an appeal from the judgment of the High Court ([1978] 2 M.L.J. 204) convicting and sentencing to death the two appellants who had been charged with murder and having under their control firearms and ammunition without lawful excuse and lawful authority. The ground of appeal relating to the evidence which it was argued was not enough to support the convictions was dismissed as having no merit. Counsel for the appellants however contended that the Essential (Security Cases) Regulations 1975, under which the trial was conducted, was invalid as the Proclamation of Emergency had not been laid before the Senate, as required by Article 150(3) of the Federal Constitution.

**Held,** dismissing the appeal: (1) on the facts in this case the Proclamation of Emergency had been laid before the Senate and therefore the argument that the Essential (Security Cases) Regulations, 1975, were invalid could not be sustained;

(2) the court was not precluded from questioning the validity of the Proclamation in this case, as section 12 of the Emergency (Essential Powers) Act, 1979, refers to proclamations issued under any Ordinance promulgated or Act enacted under Part XI of the Constitution, whereas the Proclamation was issued under the Constitution itself;

(3) the court was not precluded from examining the matter in this case as the Votes and Proceedings of the Senate were silent on the matter.

*Cases referred to:-*

(1) *Teh Cheng Poh* v. *Public Prosecution* [1979] 1 M.L.J. 50.

(2) *Teh Cheng Poh* v. *Public Prosecution* [1979] 2 M.L.J. 243.

(3) *Bailey* v. *Williamson* (1873) L.R. 8 Q.B. 118.

(4) *Dignan* v. *Australian Steamship Pty. Ltd.* (1931) 45 C.L.R. 188.

(5) *Atkinson* v. *Munt Cottrell and Co. Ltd.* (1907) 26 N.Z.L.R. 1153.

(6) *M.S.M. Sharma* v. *Shree Krishna Sinha* A.I.R. 1960 S.C. 1186.

The following cases were also cited in argument:- *Yek Tiang Sing* v. *Public Prosecution* [1971] 2 M.L.J. 94; *Awanta Singh* [1972] Cr. L.J. 1327; *Director of Public Prosecution* v. *Ping Lin* [1975] 3 All E.R. 175.

FEDERAL COURT.

*Karpal Singh* (*S.T. Lee* with him) for the appellants.

*Datuk Abu Talib bin Othman* (Solicitor-General) for the respondent.

*Cur. Adv. Vult.*

**Suffian L.P.** (delivering the judgment of the Court): We dismissed these two appeals and now give our reasons. (This was in fact one appeal given one number, but by two appellants, and it is convenient to refer to it as two appeals).

These two appeals were from the judgment of the High Court sitting in Ipoh convicting and sentencing to death the two appellants who had been charged with murdering the late C.P.O., Perak, and his driver in broad daylight in Ipoh and with having under their control firearms and ammunition without lawful excuse and lawful authority. The charges and the facts as found by the learned trial judge are set out in full in the judgment which has been reported at [1978] 2 M.L.J. 204; and there is no need to repeat them.

The grounds of appeal related, first, to the evidence which it was argued was not enough to support the convictions, and, secondly, to an important point of law.

Mr. Karpal Singh on behalf of the appellants argued that the convictions were against the weight of evidence. As we indicated during the course of arguments there was no merit in this ground. During the course of their investigation the police collected more than ample evidence which was brought before the court to justify the convictions, and the police are to be congratulated on the high standard of their investigations in this very difficult case. Also, every point in favour of the appellants had been carefully considered by the learned trial judge in his judgment, despite the strains under which he was put as a result of the appellants' contemptuous attitude and conduct in court during the trial.

As regards the point of law urged on us by Mr. Karpal Singh, before setting it out it is desirable to give the background. Parliament was dissolved on March 20, 1969, and general elections to the House of Representatives ("the lower House") were held beginning on Saturday, May 10. On the Sunday most of the results were published, and on the following Tuesday, May 13, riots broke out, mainly in Kuala Lumpur. Two days later the Yang di-Pertuan Agong proclaimed a state of emergency under Article 150(1) of the Constitution which was published as P.U.(A) 145/1969. At the same time acting under clause (2) of that Article he promulgated the Emergency (Essential Powers) Ordinance, 1969, published as P.U.(A) 146/69, ("Ordinance 1") giving himself wide powers for securing public safety, etc.: including power to make provisions departing from the Criminal Procedure Code and the Evidence Act. By section 7 of the Ordinance he suspended all uncompleted elections to the lower House. It is to be noted that all these things were done at a time when Parliament was not sitting.

Parliament did not sit again until February 20, 1971, when Government felt that security had improved and uncompleted elections had been completed.

Thus there was no sitting of Parliament at all between March 20, 1969, the date of dissolution, and February 20, 1971, a period of nearly two years.

Some time in 1975 His Majesty promulgated the Essential (Security Cases) Regulations, 1975, published as P.U.(A) 320 and 392 of 1975, in purported exercise of his powers under Ordinance 1, providing for the trial of persons charged with "security offences" in accordance with the special provisions of the regulations. The appellants were tried in accordance with these provisions.

It is to be noted that these regulations were made after Parliament had sat. In *Teh Cheng Poh* v. *Public*

*Prosecutor*,[1] however, it was held by the Privy Council that once Parliament had sat, His Majesty had no power to make Essential Regulations having the force of law, and that accordingly the regulations were *ultra vires* the Constitution and for that reason void.

Subsequently, Parliament by the Emergency (Essential Powers) Act, 1979, Act 216, purported to validate the Ordinance and regulations, and this court held on April 27, 1979, that they have indeed been validated by the Act.[2]

Notwithstanding that, Mr. Karpal Singh argued in the instant appeals that the regulations were invalid because of a new point which had not been argued and considered in that case. This new point is this: the Proclamation of Emergency was laid before the lower House (on February 23, 1971), but by Clause (3) of Article 150 it

"shall be laid before *both* Houses of Parliament;"

it was not laid before the Senate at all; and accordingly (it was argued) it was effective only until Parliament first sat in February, 1971; but thereafter it lapsed. Mr. Karpal Singh argued that the Proclamation had not been saved by Act 216, because that Act was enacted on the assumption — as can be seen from its preamble — that the proclamation was valid, as having been laid before both Houses.

In reply the learned Solicitor-General argued that, first, the Proclamation had in fact been laid before the Senate — on March 22, 1971, he said — and that, secondly, in any event the requirement to lay it before both Houses is only directory and not mandatory and in support he cited *Bailey* v. *Williamson*,[3] *Dignan* v. *Australian Steamships Pty. Ltd.*[4] and *Atkinson* v. *Munt Cottrell and Co. Ltd.*[5]

Thus the main issue here was — was the Proclamation laid before the Senate? If it was, as claimed by the learned Solicitor-General, that was the end of the matter, for everything that flowed from the Proclamation was valid, and there would be no need for us to consider the second argument of the learned Solicitor-General.

As stated, when we announced our decision on June 8, 1979, we were — and are — of the opinion that the Proclamation was laid before the Senate on the date mentioned by the learned Solicitor-General.

Clause (3) of Article 150 speaks of "laying before" Parliament, while paragraph 19 of Standing Orders of the Senate speaks of "presenting to" and "laying before" the Senate. It provides as follows:—

"19. (1) Papers shall be presented only by the President, a Minister or the chairman of a Committee, and shall be sent to the Setiausaha.

(2) Every paper a copy of which is so received by the Setiausaha shall be deemed to have been presented to the Senate and ordered to lie upon the table.

(3) The presentation of all papers shall be entered in the Votes and Proceedings of the day on which they are presented or, if the Senate is not then sitting, of the next sitting day following its presentation."

Thus it will be seen from paragraph (2) that there is not just one act — laying before the Senate — but two quite distinct acts: namely (1) presenting to the Senate and (2) laying before it. This is also clear from the affidavit of Encik Ghazali bin Haji Abdul Hamid, the senior Malay translator in the office of the Secretary to the Senate at the material time and now Assistant Secretary of Parliament, whose affidavit evidence we admitted in these appeals, in particular its paragraphs 5 and 7 where he referred to (1) presentation to and (2) laying before the Senate. That there are two distinct acts is also clear from the Votes and Proceedings (which records decisions of the House), as will be seen in a moment.

It would also appear from paragraph (2) of Standing Order 19 that presented to the Senate means received by the Senate not at a sitting but in its office by its Setiausaha.

When a document which by statute is required to be laid before the Senate is received in the office of Parliament from the relevant Ministry, it bears a number. Thus the Proclamation bore the number "ST.1/71". When it was received in the office of the Secretary to the Senate, it was entered in a Register, exhibit A, kept in his office. The page containing this and other entries has six columns. The first column gives the number of the Paper. The second column describes the instrument in bahasa which translated reads "Proclamation of Emergency — P.U.(A) 145 dated May 15, 1969". The third and fourth columns are headed jointly as "House of Representatives on dates", and the third column alone is headed "presented to" and the fourth column "laid before", i.e. before the lower House. The handwritten entries in these two columns stated that the Proclamation was presented to and laid before the lower House on February 23, 1971 — a fact not disputed. The fifth and sixth columns are jointly headed "Senate on dates"; the fifth column alone is headed "presented to" and the sixth "laid before", i.e. before the Senate. According to the handwritten entries in these two columns the Proclamation was presented to the Senate on February 23, 1971, and laid before it on March 22, 1971.

The Order Paper of the Senate giving the day's business for March 22, 1971, exhibit GAH1, mentioned the Proclamation as one of the Papers to be "presented" that day (see its page 6). The use of the word presented must have been erroneous, for the Proclamation had been presented earlier, on February 23, 1971; it must have been a mistake for "to be laid before the Senate".

Unfortunately the Votes and Proceedings of the Senate for March 22, 1971, made no mention of the Proclamation as having been laid before it. Nevertheless we were — and are — of the opinion that it must have been so laid, because

(a) it had been laid before the lower House earlier and it was difficult to suppose that it could then not have been laid before the Senate as claimed;

(b) it appeared in the Senate Order Paper for March 22, 1971;

(c) the date of the laying before the Senate was duly entered in the Register;

(d) Encik Ghazali was emphatic in his evidence that notwithstanding the errors as regards some of the entries in the Register the Proclamation was laid in the Senate on March 22, 1971; and

(e) the Votes and Proceedings of the Senate for March 22, 1971, recorded a speech from the Throne in which His Majesty explicitly referred in the second paragraph to the Proclamation in the following words:

> "you will recall that, after the general elections on 10th May, 1969, a tragic event occurred which necessitated the declaration of a state of emergency in the country on 15th May, 1969 and the suspension of parliamentary rule until conditions had returned to normal;"

which speech was no doubt debated by Hon'ble Members in the usual way and which brought to the notice of Senators, if they did not know it already, that there was an emergency, which after all is the object of laying before the House.

In our view Encik Ghazali's evidence which we accepted and the Royal Speech prove conclusively that the Proclamation has been duly laid before the Senate.

Mr. Karpal Singh's cross-examination of Encik Ghazali was directed to showing, first, that what appeared on an Order Paper was not necessarily proceeded with that day or even later, and, secondly, that the entries in the Register contained errors and alterations and were therefore unreliable and furthermore gave dates showing that Parliament had sat on dates when it was common ground that Parliament never sat at all between March 20, 1969, and February 20, 1971.

As to the first, a Paper such as the Proclamation is laid before the House without debate or discussion, which can be done in a jiffy, and it is most unlikely that the laying of the Proclamation could have been deferred on March 22.

As to the second, many entries in the Register were brought to our attention, of which mention need only be made of some. Of the twelve entries on the first page, Mr. Karpal Singh would have us believe that eleven were laid before the lower House, according to the dates given in the third columns, on various dates in 1970, when Parliament was not sitting. If this were so, then of course these entries were inaccurate as submitted by Mr. Karpal Singh, and the accuracy of the entry relating to the Proclamation would be very much in question. But as already stated, in our opinion these dates referred not to the dates when the various documents were laid before the House but to dates when they were presented to it, i.e., received in the office of the Secretary to Parliament which could be dates when Parliament was not sitting. For instance, the second entry relates to the 1968 Annual Report of F.I.D.A. (ST.2/70). According to the entry in the third and fourth columns it was presented to the lower House on January 23, 1970 (when Parliament could not have been sitting) and laid before it on February 23, 1971. This is confirmed by entry 74, on page 21 of the Votes and Proceedings of that House.

Similarly with the third entry on the first page of the Register. The 1967 Annual Report of Housing Trust for Malaya (ST.3/70) was presented to the lower House on April 30, 1970, and laid before it on February 23, 1971 — a fact confirmed by entry 75 on page 21 of the Votes and Proceedings of the lower House for February 23, 1971.

The fact that a distinction is drawn between presentation to and laying before the lower House is also made clear by many entries on page 16 of the Votes and Proceedings of the lower House for February 23, 1971. Seven of the documents listed thereon were stated to have been presented on various dates in 1969 after the dissolution on March 20, 1969, when certainly Parliament never sat at all, and laid before it on February 23, 1971, when the House certainly sat. Reference to the Votes and Proceedings of the Senate for February 20, 1971, when it first sat, also makes plain that a distinction is drawn between presentation to the Senate and laying before it. Entries marked 1 to 33 on pages 2 to 4 refer to laws and documents presented to the Senate on various dates before February 20 but laid before it on that date.

Mr. Karpal Singh also referred us to some entries, for example, on page 1 of the Register showing 20.1.71 as the date on which certain documents were laid before the lower House which date was subsequently crossed out and superimposed by the date 23.2.71, which superimpositions were not initialled. There was no explanation for these superimpositions, and our only surmise was that at that time there had been a major upheaval in the leadership of the country and originally it was planned that Parliament should first meet on January 20, 1971, but the date was subsequently changed to a later date. And there was no question that Parliament first met on February 20 and that the lower House had the various documents mentioned laid before it on February 23, 1971.

As we are of the opinion that the Proclamation was in fact laid before the Senate and therefore everything that flowed from it was valid, there is no need for us to deal with the learned Solicitor-General's second argument.

Before departing with these appeals, we would make the following two observations.

First, in our opinion we are not precluded from questioning the validity of the Proclamation by section 12 of Act 216, because that section refers to Proclamations issued under any Ordinance promulgated or Act enacted under Part XI of the Constitution, whereas this Proclamation was issued under the Constitution itself.

Secondly, reference was made during the course of arguments to Article 63(1) of the Constitution which provides:

> "The validity of any proceedings in either House of Parliament or any committee thereof shall not be questioned in any court."

and the learned Solicitor-General, relying on *M.S.M. Sharma* v. *Shree Krishna Sinha*,[6] half-heartedly argued that we had no jurisdiction to question the validity of the Proclamation. In our judgment, that article means this, that if in fact the Votes and Proceedings of the Senate recorded that the Proclamation had been laid before the Senate then, as it was also so recorded in the Register as well as mentioned in the Order Paper for the day, we would have been debarred from questioning its validity, but that we are not precluded from examining the matter where the Votes and Proceedings are silent.

*Appeal dismissed.*

Solicitors: *Low & Lee.*